The Waldinger Corporation *and* United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local No. 72. Case 10–CA–30575

June 30, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 16, 1998, Administrative Law Judge Lawrence W. Cullen issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

The issue presented in this case is whether the Respondent was privileged to withdraw its voluntary recognition of the Union because of a supervisor's involvement in the union meeting at which the employees signed cards authorizing the Union to represent them. As explained below, we agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union.

Background

The Respondent is a heating and air-conditioning service company that primarily services commercial and industrial customers. In addition to its general manager, William McMillen, and 3 administrative employees, it employs 13 "field" employees or service technicians, including Service Supervisor Arthur Peterson.[3] Prior to August 1997,[4] the Respondent was party to the National Mechanical Equipment Service and Maintenance Agreement between the Mechanical Service Contractors of America and the International Union, covering the Respondent's service employees. This 8(f) agreement was effective by its terms from August 16, 1995, through August 15, 2000, and from year to year thereafter, unless terminated by a party giving written notice no fewer than 60 days prior to August 16 of each year.[5] On June 11, the Respondent timely notified the International that it was terminating the collective-bargaining agreement, effective August 16. The International in turn notified Plumbers Local 72 (the Union), and Union Organizer Clyde Jones contacted McMillen about signing a local agreement. The Respondent declined.

In July, Jones contacted Peterson and asked him to notify unit employees that a meeting would be held at the union hall on July 31. Peterson was a longtime member of Local 72, and the Respondent was aware of that. On the evening of July 31, all 12 of the Respondent's service technicians and Peterson met with Jones and other Local 72 representatives at the union hall.[6] Peterson also advocated that they become members of Local 72 because this was the way to assure the continuation of the wage and benefit "package" they had enjoyed under the 8(f) agreement with the Union. He pointed out that the Respondent had not divulged any information about what benefits they would receive from the Respondent as a nonunion contractor; whereas, the benefit package of the union contract was a known quantity. As one employee testified, Peterson compared it to a quiz show: "[W]e didn't know what was behind Door No. 2, but we knew what was behind Door No. 1."

The union representatives left the room so that the employees could discuss the matter among themselves. Employee Timothy Hahn testified that prior to leaving the room the union representatives instructed the employees to vote whether they wanted to be represented. Hahn testified that Peterson and employees Pat Ratliff, Joe Beck, and Bob Purves griped that the Respondent "was screwing us" and that they pointed to items in "the Union book" and said "we should have got this and we should have got that." Employee Otis Borders spoke against union representation. Hahn also testified that Ratliff and Peterson suggested that the employees vote whether to be represented by the Union. Purves concurred, saying that he wanted to get home.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent also excepts to the implication in the judge's recommended Order that it owes backpayments to union benefit funds. What funds, if any, the Respondent will be required to make payments to and how much must be paid are matters to be determined in the compliance stage of this proceeding.

[3] At the hearing, the General Counsel and the Respondent stipulated that Peterson was a supervisor within the meaning of Sec. 2(11) of the Act, but the parties expressly disagreed about any impact Peterson's supervisory status may have had on the Union's acquisition of majority status.

[4] All dates are in 1997.

[5] The General Counsel and the Respondent entered into the following stipulation regarding the unit:

> All full-time and part-time HVAC service technicians employed by the [Respondent] out of its 1600 Wilson Way, Suite 12, Smyrna, Georgia, branch office, but excluding all office clerical employees, sales employees, subcontractors, professional employees, confidential employees, all other employees employed by the [Respondent], guards and supervisors as defined in the Act.

The unit constitutes an appropriate unit for the purposes of collective bargaining under a prehire agreement within the meaning of Sec. 8(f), as well as under Sec. 9(b) of the Act.

[6] The record indicates that the Union notified Peterson and another employee about the July 31 meeting because they were members and the Union did not have the other employees' addresses and telephone numbers. Employees learned of the meeting from Peterson and by word of mouth.

The employees took a vote by going around the table and determined that a majority desired representation. Peterson informed the union representatives, who then reentered and distributed authorization cards. Nine service technicians, including Peterson, signed cards authorizing Local 72 to represent them. McMillen testified that at 10 p.m. the same day, a service technician telephoned him at home "and completely reiterated what had transpired at that meeting," including the fact that all 13 service technicians attended the meeting and 9 of them signed cards.

On August 1, Jones went to McMillen's office, told McMillen that the Union had authorization cards signed by a majority of the unit employees, and presented a letter signed by Business Agent Richard Oliver demanding recognition of Local 72. According to Jones, whose testimony the judge credited, McMillen fanned the signed authorization cards that Jones showed him.[7] McMillen told Jones that the Respondent would meet and negotiate with the Union. Jones asked who would represent the Respondent in negotiations, and McMillen answered that he would let him know after talking with the Respondent's president, Thomas Koehn.

On August 4, Koehn sent a letter to Oliver stating in part, "We would be happy to conduct such negotiations, beginning immediately, at a time and place agreeable to both parties." The letter requested to meet during the week of August 11.

After sending that letter, Koehn went on vacation. Upon his return, Koehn was advised by McMillen that he had received a petition signed by a majority of unit employees indicating that they did not wish to be represented by the Union. Motivated by that petition and the "unfolding" information about Peterson's "role with the employees," Koehn sent the Union a letter on August 11 in which he withdrew recognition based on the Union's lack of majority status and canceled the negotiation meeting scheduled for that week.[8] The Respondent also ceased making contributions to the Union's pension funds on that date. The Respondent and the General Counsel stipulated that on August 18 the Respondent unilaterally implemented a pay increase, a profit-sharing and savings plan, a flexible benefit plan, a health insurance plan, and six paid holidays for unit employees.[9]

The judge found that the Union obtained majority status on July 31, when it received signed authorization cards from 9 of the 13 employees present at the union meeting. Based on the stipulation between the General Counsel and the Respondent, and on evidence that Peterson exercised authority to responsibly direct, hire, discipline, evaluate, and administer pay raises, the judge further found that Peterson was a supervisor. The judge rejected the Respondent's contention that the authorization cards were tainted by Peterson's involvement, noting that there was no evidence of any coercion by Peterson in the Union's solicitation of authorization cards. The judge noted that two of the three employees who testified about Peterson's conduct did not sign authorization cards, and found that Peterson clearly espoused his own views to employees, a position that was at odds with the Respondent's position.

The judge further found that McMillen, the highest ranking company official at the Smyrna branch, extended voluntary 9(a) recognition on behalf of the Respondent on August 1, and that Company President Koehn reaffirmed that recognition on August 4.[10] The judge also found that having voluntarily recognized the Union, the Respondent was obligated to bargain in good faith for a reasonable period of time, and that absent a reasonable period of time for bargaining, the Respondent could not rely on the employee petition to withdraw recognition.[11] Therefore, the judge concluded, by prematurely withdrawing recognition and unilaterally implementing changes in wages and benefits, the Respondent violated Section 8(a)(5) and (1).

Discussion

As explained below, we agree with the judge that the Union obtained valid authorization cards from a majority of unit employees and that the cards were not tainted by Peterson's participation. Accordingly, we further agree with the judge that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition 10 days after it voluntarily recognized the Union and by making unilateral changes.[12]

The Board has long recognized that a supervisor's participation in a union's organizational campaign will taint the union's card majority only where the supervisor's participation may be found to have deprived employees of the opportunity to exercise free choice in selecting a

[7] McMillen testified that he declined to see the cards, but that he "definitely" was given an opportunity to do so.

[8] There is no issue before us regarding the validity of the employee petition; nor is the Respondent claiming that it is entitled to withdraw recognition on the basis of it. The Respondent's argument before the Board is simply that it was entitled to withdraw recognition because the authorization cards supporting the Union's demand for recognition were tainted by Peterson's participation.

[9] Although the stipulation states that the unilateral changes were implemented on August 18, 1998, it is apparent that the parties meant 1997.

[10] The judge relied on *John Deklewa & Sons,* 282 NLRB 1375, 1387 fn. 53 (1987); *Golden West Electric,* 307 NLRB 1494, 1495 (1992); *MFP Fire Protection, Inc.,* 318 NLRB 840 (1995); *Hayman Electric,* 314 NLRB 879 (1994); and *Brannan Sand & Gravel Co.,* 289 NLRB 977 (1988).

[11] *Brooks v. NLRB,* 348 U.S. 96 (1954); *Den-Tal-EZ, Inc.,* 303 NLRB 968 (1991); *Keller Plastics Eastern,* 157 NLRB 583, 587 (1966); and *Cayuga Crushed Stone,* 195 NLRB 543, 545 (1972), enfd. 474 F.2d 1380 (2d Cir. 1973).

[12] As noted above, the Respondent does not dispute that the Union requested, and the Respondent granted, recognition of the Union as the employees' representative within the meaning of Sec. 9(a) of the Act. The Respondent argues only that the Union's basis for claiming majority support was tainted by Peterson's participation.

collective-bargaining representative. *Juniata Packing Co.,* 182 NLRB 934, 935 (1970), enfd. in relevant part 464 F.2d 153 (3d Cir. 1972); *El Rancho Market,* 235 NLRB 468, 473 (1978). Specifically, to find authorization cards tainted by supervisory conduct, the Board has required evidence that establishes either that the supervisor's activity was such as to have implied to employees that their employer favored the union or that there is cause for believing that employees were coercively induced to sign authorization cards because of fear of supervisory retaliation. *WKRG-TV, Inc.,* 190 NLRB 174, 175 (1971), enfd. 470 F.2d 1302 (5th Cir. 1973); *Orlando Paper Co.*, 197 NLRB 380, 387 (1972), enfd. 480 F.2d 1200 (5th Cir. 1973); *El Rancho Market,* supra; and *Kut Rate Kid & Shop Kwik,* 246 NLRB 106, 107 (1979).[13]

Based on our examination of the record, we do not find that either of these conditions is present in this case. To begin with, the Union's organizational campaign began only after the Respondent terminated the National Mechanical Equipment Service and Maintenance Agreement with the International Union and refused the Union's request that the Respondent sign a local agreement. In these circumstances, it was obvious to the employees that Peterson was not speaking on behalf of the Respondent when he expressed support of the Union.

Second, Peterson, though present for the employees' signing of authorization cards, did not solicit the cards himself. Rather, the union representatives distributed the cards and collected them from the employees who signed them. [14]

Further, there is no evidence that establishes that Peterson's conduct at the meeting was likely to coerce an employee into signing an authorization card. His statements in support of the Union during the round table discussion were unaccompanied by any threats of retaliation, i.e., he said nothing to convey any suggestion that he would use his supervisory powers to bring pressure to bear on employees who did not support the Union.[15] All of the employees were aware that Peterson was a longtime member of the Union. As employee Borders observed, Peterson "is one of the guys and he was invited [to the meeting with the union representatives]. The door at the [Union] was open to any Union member no matter what you are." As set out in the "Background" section, above, Peterson's message to this fellow workers was simply that none of them (Peterson included) could know what wages and benefits they could expect in the future if the Respondent persisted in its refusal to recognize the Union. Such a statement would likely be regarded as a "fellow worker's'' view of a mutual plight, and would not reasonably be taken as a statement of someone speaking in his role as an agent of management.[16]

Under these circumstances, we find that Peterson's presence at the union meeting at which employees signed authorization cards and his statements in support of the Union are insufficient to establish that the cards were tainted. See *Pantex Towing Corp.,* 258 NLRB 837, 846 (1981); *Brown & Connolly, Inc.,* 237 NLRB 271, 273 (1978); *WKRG-TV,* 190 NLRB at 175; and *Clay City Beverages, Inc.*, 176 NLRB 681, 682 (1969). Accordingly, we find that the Union represented a valid majority of unit employees at the time the Respondent voluntarily recognized it as the employees' 9(a) bargaining representative on August 1 and that the Respondent was obligated to bargain with the Union for a reasonable period of time. We therefore find that the Respondent violated Section 8(a)(5) and (1) when it withdrew recognition from the Union on August 11 and made unilateral changes in the employees' terms and conditions of employment on August 18.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Waldinger Corporation, Smyrna, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I find that the Union's authorization cards were tainted by the actions of Supervi-

[13] Our dissenting colleague disagrees with this precedent and would find that supervisory solicitation of authorization cards is inherently coercive. This argument by our colleague was rejected by the Board in a recent representation case. See *Millsboro Nursing & Rehabilitation Center,* 327 NLRB No. 153 (1999).

[14] The instant case is thus distinguishable from the cases cited by the Respondent in which there was evidence that the supervisor engaged in direct solicitation of authorization cards, which the Board found tainted those cards. See *Desilu Productions, Inc.,* 106 NLRB 179, 182 (1953); *Insular Chemical Corp.,* 128 NLRB 93, 98 (1960); *Dexter IGA Foodliner,* 209 NLRB 369, 373 (1974); *Sarah Neuman Nursing Home,* 270 NLRB 663 fn. .2 (1984); *Reeves Bros., Inc.,* 277 NLRB 1568 fn. 1 (1986); and *Anaheim Town & Country Inn,* 282 NLRB 224, 228–230 (1986).

[15] After recognition was granted, Peterson commented to Timothy Hahn that "those of you who did not sign a card, you better get that card—you better get the card now" because "you can't be nonunion and work a Union shop." Since this remark was made after the employees had signed authorization cards, it could not serve as evidence that Peterson coerced Hahn or any other employee to sign authorization cards.

[16] We note that under the Act, although an employer may prohibit his supervisors from belonging to a union, barring such a prohibition a supervisor is free to be a union member and may even be covered by the collective-bargaining agreement. See, e.g., *Gratiot Community Hospital,* 312 NLRB 1075 fn. 2 (1993), and cases there cited, enf. denied in part on other grounds 51 F.3d 1255 (6th Cir. 1995). Thus, the Act does not presume that a supervisor's membership and participation in union activities necessarily coerces his fellow employees. Here, the Respondent had permitted Peterson to remain a union member, and kept him at arms length regarding wage and benefit decisions, declining to tell him what the Respondent had in mind for changes in employee wages and benefits once it was no longer applying the union contract terms. The Respondent thus dealt with him as simply part of the work force.

sor Arthur Peterson in the card-signing process. Therefore, as the Union never established valid majority status, the Respondent was not obligated to recognize and bargain with the Union.

In brief, the facts are as follows. On July 31, 1997, at a meeting at the union hall, the Respondent's 12 employees met with Peterson and officials from the Union. Peterson was the leading advocate for the Union. He was the one who announced and spread the word as to the meeting. Peterson advocated that all employees join the Union. He argued that the Union's benefit package was a known quantity and that employees should not reject it. Critically, although the union officials left the meeting at one point, Peterson did not. He remained for the employee discussion and for the open informal vote to join the Union. After the union representatives returned to the meeting, Peterson signed a card, and he witnessed the card-signings by the other employees.

As set forth in my dissent in *Millsboro Nursing & Rehabilitation Center,* 327 NLRB 879 (1999), I believe that supervisory solicitation of an employee to sign an authorization card is coercive, even in the absence of an explicit threat or promise of benefit. Peterson had control over the working lives of these employees. He exercised authority to discipline, evaluate, direct, and administer pay raises. Armed with this authority, Peterson solicited the employees to sign authorization cards. Though union officials may have physically passed out and retrieved the authorization cards, Peterson was a leading force in the entire process. He strongly advocated joining the Union and spoke in favor of the Union's benefit package. Peterson personally signed a card in front of the employees. Significantly, he also witnessed the open vote and the card-signing—thus observing whether or not employees responded to his plea.

In sum, the supervisor who had power over the work lives of employees watched to see whether these employees responded to his urging that they join the union. Clearly, if he had engaged in this conduct in order to persuade employees to abandon the union, a resultant anti-union petition would be tainted. I see no reason to reach a different result where, as here, the supervisors seek to have the employees sign a prounion document. Thus, in my view, Peterson's role and actions coerced employees into signing cards. Therefore, these tainted cards could not establish a valid majority on behalf on the Union.

My colleagues argue that Supervisor Peterson was free to be a union member and that the Respondent dealt with him as part of the work force. As shown below, neither argument is persuasive. As to the first argument, the issue is not whether Peterson could be a union member. Rather, the issue is whether *his conduct* in the instant case, coupled with his power over employment conditions, would tend to interfere with the employees' exercise of Section 7 rights.

As to the second point, the issue is not how the Respondent treated Peterson. Rather, the issue has to do with Peterson's supervisory relationship to employees. In light of that relationship, and Peterson's control over pay raises and discipline, there is a concern that employees would not be inclined to bite the hand that feeds them.

The Respondent, upon learning of the circumstances of the employee card-signing, withdrew its earlier recognition of the Union. As its recognition was based on the tainted cards, the Respondent was privileged, if not obligated, to withdraw recognition. I would therefore dismiss the complaint.

Carla L. Wiley, Esq., and Lisa Y. Henderson, Esq. for the General Counsel.
James R. Swanger, Esq., for the Respondent.
John McIntire, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on June 24, 1998. I issued a Bench Decision on June 25, 1998, pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations on the entire record in this proceeding including my consideration of the arguments of counsel and the trial memorandum filed by the Charging Party. In accordance with Section 102.45 of the Board's Rules and Regulations I certify the accuracy of, and attach hereto as "Appendix A" the pertinent portion of the trial transcript (pp. 182–197) as corrected and modified.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Waldinger Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and failing and refusing to recognize the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full time and part time HVAC service technicians employed by the Employer out of its 1600 Wilson Way, Suite 12, Symrna, Georgia Branch Office but excluding all office clerical employees, sales employees, sub-contractors, professional employees, confidential employees, all other employees employed by the Employer, guards, and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly with the unit employees with respect to wages and other terms and conditions of employment and unilaterally implementing the following changes in the terms and conditions of employment of its employees:

> 1. a pay increase
> 2. a profit sharing and savings plan

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

3. a flexible benefits plan
4. a health insurance plan, and
5. six paid holidays.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the policies of the Act.

(a) Recognize and on request, bargain with the Union on behalf of the employees in the above-described unit for a reasonable time and if agreement is reached embody it in a signed agreement.

(b) Make the unit employees whole for any loss of earnings or benefits sustained by them as a result of Respondent's withdrawal of recognition from and its failure and refusal to bargain with the Union on their behalf, and its bypassing of the Union as the collective-bargaining representative of the unit employees and Respondent's institution of unilateral changes in the terms and conditions of employment of its employees, with interest, as set out in "the Remedy."

(c) Rescind any of the aforesaid unilateral changes on the written request of the Union.

(d) Within 14 days after service by the Region, post at its facility in Smyrna, Georgia, copies of the attached notice marked "Appendix B.[2]" Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. The complaint is otherwise dismissed as to violations not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from and fail and refuse to recognize the United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local No. 72 as the exclusive collective bargaining representative of the unit employees.

WE WILL NOT bypass the Union and deal directly with the unit employees with respect to wages and other terms and conditions of employment and will not unilaterally implement:

1. a pay increase
2. a profit sharing and savings plan
3. a flexible benefits plan
4. a health insurance plan, and
5. six paid holidays.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, on request, bargain with the Union on behalf of the employees in the above-described unit for a reasonable time and if agreement is reached, embody it in a signed agreement.

WE WILL make the unit employees whole for any loss of earnings or benefits sustained by them as a result of our withdrawal of recognition and our failure and refusal to bargain with the Union on their behalf, and our bypassing the Union as the collective-bargaining representative of the unit employees and our institution of unilateral changes in their terms and conditions of employment, with interest.

WE WILL rescind any of the aforesaid unilateral changes on the written request of the Union.

THE WALDINGER CORPORATION

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APPENDIX A

BENCH DECISION

I heard this case on June 24, 1998 in Atlanta, Georgia pursuant to a Complaint filed by the Regional Director of Region 10 of the National Labor Relations Board ("The Board") on April 16, 1998.

The Complaint is based on a charge filed by the United Association of Journeymen and Apprentices, of Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO Local No. 72 ("The Charging Party") or ("The Union") on October 14, 1997.

The Complaint alleges that The Waldinger Corporation ("The Respondent") or ("The Company") violated Section 8(a)(5) and (1) of the Act by the issuance of a letter dated August 11, 1997 withdrawing recognition from the Union which it had previously recognized as the exclusive collective bargaining representative of the employees in the following described unit and that description as stipulated by the Parties and as set out in Joint Exhibit 1 is:

"All full time and part time HVAC service technicians employed by the Employer out of its 1600 Wilson Way, Suite 12,

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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Symrna, Georgia Branch Office but excluding all office clerical employees, sales employees, sub-contractors, professional employees, confidential employees, all other employees employed by the Employer, guards, and supervisors as defined in the Act" constitute an appropriate unit for the purposes of collective bargaining under a pre-hire agreement within the meaning of Section 8(f) of the Act as well as under Section 9(b) of the Act.

It is alleged, it is admitted, and I find that the above described unit constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

It is further alleged that since the withdrawal of recognition the Respondent has thereafter failed and refused to bargain with the Union as the exclusive collective bargaining representative of the unit, and that since or about August 11, 1997 the Respondent has bypassed the Union and dealt directly with the employees in the unit with respect to wages and other terms and conditions of employment, and that Respondent has since August 11, 1997 unilaterally implemented changes in the terms and conditions of employment of its employees in violation of Section 8(a)(5) and (1) of the Act.

The Respondent has by its Answer filed on April 21, 1998 denied the commission of any violations of the Act.

The Complaint alleges and it is admitted and I find that

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at all material times herein the Respondent has been an Iowa Corporation with an office and place of business in Smyrna, Georgia herein called Respondent's facility where it has been engaged in the service and maintenance of mechanical equipment;

And that during the past twelve month period Respondent in conducting its aforesaid business operations has provided services valued in excess of $50,000.00 directly to customers located outside the State of Georgia, and

That Respondent has been an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is further alleged, admitted, and I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

It is further alleged and admitted by Respondent that at all times herein the Company President Thomas Koehn, Branch Manager William McMillen, Personnel Manager Becky Buch, and Service Supervisor Arthur C. Peterson have been supervisors of Respondent within the meaning of Section 2(11) of the Act and Agents of Respondent within the meaning of Section 2(13) of the Act. With respect to supervisor Arthur Peterson I will treat that separately.

All right. Respondent is engaged in the installation, service, and maintenance of heating and air conditioning equipment for large commercial facilities. It is

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headquartered in Des Moines, Iowa with several branch offices throughout the Mid-West and Southeast including an office in Smyrna, Georgia which is also referred to as the Atlanta Branch Office.

Thomas Koehn is the President of Respondent and is headquartered in Iowa. William McMillen is the General Manager of the Atlanta Branch in Smyrna, Georgia. Local 72 is an affiliate of the International servicing the greater Atlanta Metropolitan area with its work jurisdiction including servicing, maintenance, and installation of HVAC equipment and represents HVAC service technicians and employees who are signatory to the National Mechanical Equipment, Service, and Maintenance Agreement.

That's NMESMA or the National Agreement which is a collective bargaining agreement negotiated by the International Union and the Mechanical Service Contractors of America.

This agreement provides for wages, benefits, and other terms and conditions of employment to be "in accordance with established Local agreements to the extent they do not conflict with the National agreement".

Prior to August 16, 1997 Respondent's service technicians were covered by the National agreement. Respondent was a signatory to an 8(f) - Section 8(f) of the Act pre-hire agreement with the International which had been entered into on November 6, 1990.

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Under the terms of the agreement the Union or the Respondent could terminate it by giving to the other sixty days notice prior to August 16th of each year. On June 30, 1997 Respondent's President Koehn gave notice by letter to International representative Donald House of Respondent's intention to terminate the agreement.

House then sent a letter to each of the Local Unions covered by the letter of termination including Local 72. Local 72 organizer Clyde Jones testified that after the receipt of the July 1 memo from House directing Local 72 to obtain a Local agreement with Respondent he telephoned Respondent's President Koehn and asked him what was wrong with the International agreement.

Koehn's response was negative and Jones did not ask him to enter into a Local agreement. Subsequently, Jones telephoned several of the unit employees of the Respondent, including Art Peterson, a supervisor for Respondent, and set up a meeting at Local 72's Union Hall between the employees including Peterson and also with Richard Oliver, Local 72's Business Manager, and its Business Agent Ray Cashwell at which Oliver explained the Union's health and welfare plan, pension plan, and referral procedures.

After much discussion the Union representatives left the room and the employees voted 9 to 4 in favor

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of representation by the Union. After the vote the Union representatives returned and Jones passed out Union authorization cards which were signed by nine of the thirteen employees at the meeting.

This meeting was held on July 31st. The next day, August 1, 1997, Jones and Cashwell presented a letter demanding to negotiate to Branch Manager McMillen at his office. This letter had been signed by Business Manager Oliver.

The letter stated to The Waldinger Company "Please be advised that Local 72 United Association of Journeymen and Pipefitters of the Plumbing and Pipefitting Industry of the United States and Canada continues to represent Waldinger's mechanics in Atlanta. Local 72 demands that Waldinger negotiate in good faith the terms and conditions of the employees' employment and sign a collective bargaining agreement with Local 72. Sincerely, Richard L. Oliver, Business Manager Local Union 72."

Jones testified that McMillen fanned the cards, the Union cards which he presented to him, and said that the Respondent

was ready to negotiate but that he would need to talk to Respondent's President Koehn and would contact Jones again.

On August 4, 1997 Respondent's President Koehn sent Local 72 a letter agreeing to enter into negotiations which letter reads as follows: It's addressed to Richard L. Oliver,

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Business Manager Plumbers and Pipefitters Local 72. "Dear Mr. Oliver. Our Atlanta Office has forwarded to me your letter of August 1, 1997 requesting that Waldinger negotiate in good faith the terms and conditions of employment. We would be happy to conduct such negotiations beginning immediately at a time and place agreeable to both parties.

If Local 72 has a proposed agreement would you please forward a copy to me immediately so that I may review it before we meet. I assume that your proposed agreement would include qualified benefit plans. If it does would you also include copies of the related summary plan descriptions for those benefit plans.

Once we review your proposal I would like to schedule a meeting during the week of August 11. Sincerely, Thomas K. Koehn, President."

On August 11, 1997 Respondent's President Koehn sent Local 72 another letter withdrawing recognition which reads as follows: Addressed to Richard L. Oliver, Business Manager Plumbers & Pipefitters Local 72. "Dear Mr. Oliver. I've recently been advised that a majority of our Atlanta employees do not wish to be represented by Plumbers & Pipefitters Local 72.

We do not therefore intend to bargain with Plumbers & Pipefitters Local 72 for a new collective bargaining agreement; and, accordingly, the meeting to be scheduled this

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week will not be necessary.

The Company will continue to abide by the applicable terms of the National Mechanical Equipment Service and Maintenance Agreement through its August 15, 1997 expiration date.

Please be advised however that because Plumbers & Pipefitters Local 72 does not enjoy majority status the Company will not recognize Plumbers & Pipefitters Local 72 after August 15, 1997. Sincerely, Thomas K. Koehn, President."

Since August 11, 1997 Respondent has not recognized and bargained with the Union, nor has it paid into the Union's pension funds.

Respondent's Branch Manager, William McMillen, testified that on August 1 Jones introduced him to the other gentleman who was Business Agent Cashwell and they shook hands and Jones gave him the letter of that date in an envelope which he then opened and read.

Jones asked him who would represent the Respondent in negotiations and he said he would but that he needed to get in touch with Respondent's President Koehn. Both men then left his office.

He testified he has never seen the Union authorization cards before the date of the hearing but acknowledged that Jones had offered him the cards which he refused to take or look at them.

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On cross examination McMillen testified that Jones asked him if he would like to see the cards and he said "no". McMillen also testified on cross examination that he had heard from employees prior to this incident that nine employees had signed Union cards and had been aware prior to the July 31 meeting that the employees' meeting was to take place.

Under these circumstances I find that the Union presented General Manager McMillen with a valid demand for recognition coupled with proof of majority support of the unit employees as evidenced by the Union authorization cards.

I credit Jones' version of the events when he presented the letter and the cards to McMillen and offered to present the cards to McMillen. However, even under McMillen's version it is clear that he was presented with a demand for recognition and offered proof of a showing of majority support for the Union but he declined the proof and agreed to meet with the Union.

I thus find that he, as the person with the profit and loss responsibility and the highest level official at the Atlanta Branch Office, recognized the Union voluntarily thus establishing the Section 9(a) status of the Union as the collective bargaining representative of the unit employees.

Respondent's President reaffirmed this recognition by his letter of August 4, 1997. McMillen testified on direct

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examination that on August 6th, a Wednesday, he received two petitions from the service technicians addressed to President Koehn, one of which was signed by eight service technicians, and the other of which was signed by eleven of the service technicians stating that they did not wish to be represented by the Union.

He called President Koehn and forwarded these petitions to him after receiving them. On cross examination McMillen acknowledged that he himself had drafted the petitions which were identical copies after conferring with the Company's attorney and having referred service technician Pat Ratcliff to a private attorney.

Ratcliff had called him and said that he had changed his mind about Union representation and told him that he and several other employees wanted to file the petition. McMillen testified that he drafted the petition on August 5th and that it was circulated during the morning of August 6th by Ratcliff who called the service technicians into the office from their jobs in the field during working hours to sign the petition with McMillen's admitted acquiescence.

The Respondent contends that the employees' selection of the Union as their collective bargaining representative is tainted by the supervisory involvement of Art Peterson, the supervisor of the service technicians, and Respondent presented three service technicians who testified that

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Peterson was a leading supporter of the Union at the employee meeting of July 31 and contended that he would rather have a known benefit package which was the Union's rather than an unknown package which would be the Company's.

The Respondent contends, the General Counsel stipulates that Peterson was a Section 2(11) supervisor under the Act. However, the Charging Party opposes the stipulation.

I find on the basis of the stipulation of the Respondent and the General Counsel and the substantial evidence of Peterson's supervisory status that he was at all times material herein a supervisor under the Act who had the authority and exercised the authority to responsibly direct the service technicians in the field, to hire, to discipline, to evaluate, and administer pay raises to these employees.

The Respondent contends that Peterson's involvement at the meeting thus tainted the selection of the Union by the employees and their signing of authorization cards. Service technicians Timothy Hahn, Steve Borders, and Joseph Beck all testified concerning Peterson's participation in favor of the Union at the July 31 meeting.

Hahn and Borders did not sign a card. Beck did. However, there was no evidence of any coercion by Peterson who was espousing a position which was at odds with the Company's position.

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Company President Thomas Koehn testified he sent the August 11 letter withdrawing recognition as it was clear on the basis of the petitions that the Union did not represent a majority of the employees and that he had never thought that they had represented a majority of the employees, and also, because of Peterson's involvement with the process.

The Parties have stipulated also that the Respondent implemented the following unilateral changes effective August 18, 1998 for all service technicians: (1) A pay increase. (2) A profit sharing and savings plan. (3) A flexible benefits plan. (4) A health insurance plan, and (5) Six paid holidays.

Analysis and Conclusions. I find that the Respondent voluntarily recognized the Union as the collective bargaining representative of the unit employees on August 1, 1997 and reaffirmed this by the letter sent to the Union by Respondent's President Koehn on August 4 reaffirming this voluntary recognition. Thus, the Union was the collective bargaining representative of the unit employees under Section 9(a) of the Act.

I would cite in support of this position *John Deklewa and Sons, Inc.,* 282 NLRB 1375, 1387 Footnote 53 (1987); *Pierson Electric Inc., d/b/a Golden West Electric*, 307 NLRB 1494, 1495 (1992); *MFP Fire Protection, Inc*., 318 NLRB 840 (1995*); Hayman Electric, Inc*., 314 NLRB 879 (1994); Brannon Sand *and Gravel Company*, 289 NLRB No. 128 (1988).

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I find that the selection of the Union by the unit employees and the signing of Union authorization cards by them at the July 31 meeting was not tainted by supervisory involvement.

Here the Employer has failed to show that there was any unlawful coercion of the employees by Peterson who was clearly espousing his own views in contrast to the Respondent's position.

In support of this I cite *Brooks v. NLRB* 348, U.S. 96 (1954); *Wehrenberg Theaters, Inc.,* 260 NLRB 18, 22 (1982); *Pacific Physicians Services, Inc*., 313 NLRB No. 200 (1994); *Silbase Company,* 290 NLRB No. 157 (1988).

I find that the withdrawal of recognition and refusal to bargain bypassing the Union and the implementation of the unilateral changes by Respondent as set out hereinabove was violative of Section 8(a)(5) and (1) of the Act.

Having voluntarily recognized the Union the Respondent was obliged to engage in bargaining upon request by the Union for a reasonable period of time. Respondent's withdrawal of recognition was unlawful and destabilized the collective bargaining relationship. Respondent could not rely on the petition as the Union had not been afforded a reasonable time to represent the employees and bargain on their behalf. I cite *Brooks v. NLRB*, supra, I believe that was and *Star Dental*

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Products, 303 NLRB 968 (1991); *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966); *Cayuza Crushed Stone, Inc.,* 195 NLRB 543, 545 (1972).

Conclusions of law. The Respondent is an Employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act. (2) The Union is a labor organization within the meaning of Section 2(5) of the Act. (3) Respondent violated Section 8(a)(5) and (1) of the Act by its withdrawal of recognition from the Union, it's failure and refusal to recognize the Union as the exclusive collective bargaining representative of the employees in the aforesaid appropriate bargaining unit, and by bypassing the Union in dealing directly with the unit employees with respect to wages and other terms and conditions of employment, and by unilaterally implementing the following changes in the terms and conditions of employment of its employees which were:

(1) A pay increase. (2) A profit sharing and savings plan. (3) A flexible benefits plan. (4) A health insurance plan; and (5) Six paid holidays.

The Remedy. Having found that the Respondent has engaged in violations of the Act it will be recommended that the Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act and post the appropriate notice.

It is recommended that the Respondent recognize and on

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request bargain with the Union on behalf of the employees in the above described unit. It is further recommended that the Respondent make the aforesaid employees whole for any loss of earnings or benefits sustained by them as a result of Respondent's failure and refusal to recognize the Union and bargain on their behalf and its bypassing of the Union as the exclusive collective bargaining representative of the unit employees and Respondent's institution of unilateral changes in the terms and conditions of employment of its employees. In accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), these sums shall be with interest, as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1982) which provides for interest to be computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 Amendment to 226 USC Section 6621. Respondent will also be ordered to rescind any of the aforesaid unilateral changes upon the written request of the Union.

When I receive the transcript in this case I will review my decision and I may correct it or modify it as warranted and will then certify it in its modified form. Exceptions shall run from that point.

Is there anything further before I close the hearing in this case?

MS. WILEY: No, Your Honor.

MR. McINTIRE: No, Your Honor.

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JUDGE CULLEN: Hearing no answer the hearing is now closed.

(Off the record.)

(Whereupon, the hearing in the above entitled matter closed at 12:00 noon.)

Date: June 25, 1998